

OCT 25 2006

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**BEFORE THE ARIZONA STATE BOARD OF PHARMACY**

In the Matter of

**WILLIAM BROPHY,**

Holder of License No. 12173  
For the Practice of Pharmacy  
In the State of Arizona

Board Case No. 06-0027-PHR

**CONSENT AGREEMENT**

**RECITALS**

In the interest of a prompt and judicious settlement of this case, consistent with the public interest, statutory requirements and the responsibilities of the Arizona State Board of Pharmacy ("Board") and under A.R.S. §§ 32-1901, *et. seq.* and 41-1092.07(F)(5), William Brophy ("Respondent"), holder of Arizona Pharmacist License Number 12173, and the Board enter into the following Recitals, Findings of Fact, Conclusions of Law and Order ("Consent Agreement") as a final disposition of this matter.

1. Respondent has read and understands this Consent Agreement and has had the opportunity to discuss this Consent Agreement with an attorney, or has waived the opportunity to discuss this Consent Agreement with an attorney.

1           2.     Respondent understands that he has a right to a public administrative  
2 hearing concerning the above-captioned matter, at which hearing he could present  
3 evidence and cross examine witnesses. By entering into this Consent Agreement,  
4 Respondent knowingly and voluntarily relinquishes all right to such an administrative  
5 hearing, as well as rights of rehearing, review, reconsideration, appeal, judicial review or  
6 any other administrative and/or judicial action, concerning the matters set forth herein.

7           3.     Respondent affirmatively agrees that this Consent Agreement shall be  
8 irrevocable.

9           4.     Respondent understands that this Consent Agreement or any part of the  
10 agreement may be considered in any future disciplinary action by the Board against him.

11          5.     Respondent understands this Consent Agreement deals with Board  
12 Complaint No. 3098 involving allegations of unprofessional conduct against Respondent.  
13 The investigation into these allegations against Respondent shall be concluded upon the  
14 Board's adoption of this Consent Agreement.

15          6.     Respondent understands that this Consent Agreement does not constitute a  
16 dismissal or resolution of any other matters currently pending before the Board, if any,  
17 and does not constitute any waiver, express or implied, of the Board's statutory authority  
18 or jurisdiction regarding any other pending or future investigation, action or proceeding.

19          7.     Respondent also understands that acceptance of this Consent Agreement  
20 does not preclude any other agency, subdivision, or officer of this State from instituting  
21 any other civil or criminal proceedings with respect to the conduct that is the subject of  
22 this Consent Agreement.

23          8.     All admissions made by the Respondent in this Consent Agreement are  
24 made solely for the final disposition of this matter, and any related administrative  
25 proceedings or civil litigation involving the Board and Respondent. Therefore, any  
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1 admissions made by Respondent in this Consent Agreement are not intended for any  
2 other use, such as in the context of another regulatory agency's proceedings, or civil or  
3 criminal proceedings, whether in the State of Arizona or in any other state or federal  
4 court.

5 9. Respondent acknowledges and agrees that, upon signing this Consent  
6 Agreement and returning this document to the Board's Executive Director, he may not  
7 revoke his acceptance of the Consent Agreement or make any modifications to the  
8 document regardless of whether the Consent Agreement has been signed by the  
9 Executive Director. Any modification to this original document is ineffective and void  
10 unless mutually agreed by the parties in writing.

11 10. Respondent understands that the Consent Agreement shall not become  
12 effective unless and until adopted by the Board and signed by its Executive Director.

13 11. If a court of competent jurisdiction rules that any part of this Consent  
14 Agreement is void or otherwise unenforceable, the remainder of the Consent Agreement  
15 shall remain in full force and effect.

16 12. Respondent understands and agrees that if the Board does not adopt this  
17 Consent Agreement, he will not assert as a defense that the Board's consideration of this  
18 Consent Agreement constitutes bias, prejudice, prejudgment or other similar defenses.

19 13. Respondent understands that this Consent Agreement is a public record that  
20 may be publicly disseminated as a formal action of the Board and may be reported as  
21 required by law to the National Practitioner Data Bank and the Healthcare Integrity and  
22 Protection Data Bank.

23 14. Respondent understands that any violation of this Consent Agreement  
24 constitutes unprofessional conduct and may result in disciplinary action. A.R.S. §§ 32-  
25 1901.01(B)(20), -1927(A)(1).

1        14. Respondent understands that any violation of this Consent Agreement  
2 constitutes unprofessional conduct and may result in disciplinary action. A.R.S. §§ 32-  
3 1901.01(B)(20), -1927(A)(1).

4  
5            **ACCEPTED AND AGREED BY RESPONDENT**

6        William Brophy  
7        William Brophy

Dated: 9-14-06

8        Subscribed and sworn to before me in the County of Maricopa, State of ARIZONA,  
9 this 14<sup>th</sup> day of September, 2006, by William Brophy.

10        Alma Janey  
11        NOTARY PUBLIC

12        My Commission expires: May 8, 2009

13  
14            **FINDINGS OF FACT**

15        1. The Arizona State Board of Pharmacy ("Board") is the duly constituted  
16 authority for licensing and regulating the practice of pharmacy in the State of Arizona.

17        2. William Brophy ("Respondent") holds Arizona Pharmacist License  
18 Number 12173.

19        3. During all times relevant to these findings, Respondent served as the  
20 Pharmacist-in-Charge for UpTown Pharmacy in Phoenix, Arizona. Uptown Pharmacy,  
21 owned by Gary Gilbert and OEDIV Corp., holds Arizona Pharmacy Permit Number  
22 2508. ("Permittee").

23        4. On or about April 19, 2006, Board staff initiated an investigation after  
24 receiving a complaint from a California patient's family member alleging that Patient  
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1 analgesic used for the management of moderate to moderately severe pain.  
2 Recommended dosage is 50 to 100 mg as needed for pain every four to six hours, not to  
3 exceed 400 mg per day. However, Tramadol has the potential to cause psychological  
4 dependence due to disruption in serotonin levels. Because it can reinitiate physical  
5 dependence, Tramadol should not be used in patients with a tendency to drug abuse or a  
6 history of chronic opioid use or drug dependence.

7 6. According to records provided to the Board by UpTown Pharmacy, it filled  
8 the following Tramadol 50mg prescriptions for the Patient (under the names K.F. and  
9 S. F.) between September 2005 and January 2006:

<u>Date</u>	<u>Rx No.</u>	<u>Quantity</u>	<u>Patient Name</u>
09/07/05	UT5268	100	S.F.
09/15/05	UT5872	90	K.F.
09/16/05	UT5924	100	S.F.
09/28/05	UT6636	90	K.F.
09/29/05	UT6692	100	S.F.
10/10/05	UT7325	60	S.F.
10/17/05	UT7693	60	S.F.
10/25/05	UT8252	60	S.F.
11/08/05	UT9312	30	S.F.
11/09/05	UT9424	90	K.F.
11/18/05	UT10636	90	K.F.
12/01/05	UT12293	90	K.F.
12/06/05	UT12902	100	S.F.
12/12/05	UT13501	90	K.F.
12/14/05	UT13928	90	S.F.
12/28/05	UT15430	100	K.F.
12/30/05	UT15783	90	S.F.
01/12/06	UT17352	90	S.F.
01/13/06	UT17537	100	K.F.
01/23/06	UT18512	60	S.F.
01/27/06	UT19201	100	K.F.

21 21 Rx 1780

23 7. Respondent manually initialed several of those Internet prescription orders.

24 8. UpTown Pharmacy received the Internet prescription orders from Brandt  
25 Technology Services L.L.C. ("Brandt Technology"), owned by Gary Brandt. Brandt  
26

1 Technology contacted Respondent to arrange UpTown Pharmacy's dispensing for  
2 Internet prescription orders received from Brandt Technology.

3 9. Before receiving prescription drugs from UpTown Pharmacy, a patient fills  
4 out an on-line medical questionnaire. The medical questionnaire is reviewed by Turino  
5 Jennings, M.D., a Virginia-licensed allopathic physician. Dr. Jennings did not discuss  
6 medical history or physical symptoms with the patient, or perform a physical examination  
7 of the patient. After he reviews the patient's on-line medical questionnaire, Dr. Jennings  
8 decides whether to authorize a prescription for the patient and transmits the prescription  
9 information to Brandt Technology. Employees for Brandt Technology process the  
10 information from the patient and Dr. Jennings, and create a hard copy prescription order  
11 and mailing label, which are transmitted daily to UpTown Pharmacy. Brandt Technology  
12 does not hold an Arizona Pharmacy License. Although some of Brandt Technology's  
13 employees are certified pharmacy technicians, those employees do not hold Arizona  
14 Pharmacy Technician Licenses.

15 10. In addition to receiving and entering information into the patient's profile,  
16 unlicensed Brandt Technology employees work at UpTown Pharmacy where they assist  
17 in dispensing prescription drugs and perform duties that only a licensed pharmacist or  
18 pharmacist technician may lawfully perform.

19 11. Although UpTown Pharmacy has a Brandt Technology computer that  
20 provides the patient profile information associated with the prescription orders,  
21 Respondent has restricted access that information. However, unlicensed Brandt  
22 Technology employees have access to that patient profile information, so that Respondent  
23 could retrieve needed patient information.

24 12. UpTown Pharmacy purchases and receives from licensed wholesalers the  
25 prescription drugs, vials and lids it uses to fill the Internet prescription orders. Brandt  
26

1 Technology reimburses UpTown Pharmacy for the cost of those drugs and materials and  
2 pays UpTown Pharmacy a flat fee for filling the Internet prescription orders.

3 13. After filling the Internet prescription orders, UpTown Pharmacy mails via  
4 UPS the vials containing the prescription drugs to patients directly from UpTown  
5 Pharmacy.

6 14. Between July 7, 2005 and April 17, 2006, UpTown Pharmacy filled 28,527  
7 Internet prescription orders authorized by Dr. Jennings. It filled an average of 141  
8 prescriptions orders per day during the 202 days reviewed, with a high of 322  
9 prescriptions filled on November 29, 2005.

10 15. UpTown Pharmacy dispensed the following prescription-only medications  
11 from Dr. Jennings' Internet prescription orders: Tramadol (26,517 prescriptions), Viagra  
12 (1,100), Cialis (451), Acyclovir (151), Levitra (128), Propecia (43), Valtrex (40), Xenical  
13 (20), Lunesta (15), Vaniqua (14), Retin-A (9), Condyllox (8), Renova (7), Aldara (5),  
14 Denavir (3), Ortho Dialpak (3), Famvir (2), Nexium (2), Rozerem (2), Zyban (2),  
15 Celebrex (1), Flonase (1), Ortho Tricyclen (1), Plan B (1) and Zovirax (1).

#### 16 CONCLUSIONS OF LAW

17 1. The Board possesses jurisdiction over the subject matter and over Respond-  
18 ent pursuant to A.R.S. § 32-1901 *et seq.*

19 2. The Board may discipline a pharmacist who has engaged in unprofessional  
20 conduct. A.R.S. § 32-1927(A)(1).

#### 21 Knowingly Dispensing Prescription-Only Drugs From Prescription Orders 22 Based Upon Internet Diagnoses.

23 3. A pharmacist shall ensure that a prescription-only drug is dispensed only  
24 after receipt of a valid prescription order from a licensed medical practitioner. A.C.C. §  
25 R4-23-404(E)(1); *see also* 21 C.F.R. § 1306.04(a).  
26

1           4.     To be valid, a prescription must be issued for a legitimate medical purpose  
2 by an individual practitioner acting in the usual course of his professional practice. 21  
3 C.F.R. § 1306.04(a); *see also* 66 Fed. Reg. 21181-84 (April 27, 2001) (Guidance for  
4 Dispensing and Purchasing Controlled Substances over the Internet).

5           5.     A physician may not prescribe a prescription-only drug to a person unless  
6 the physician first conducts a physical examination of that person or has previously  
7 established a doctor-patient relationship. A.R.S. § 32-1401(27)(ss); *see also* American  
8 Medical Association, Policy H-120.49 (Guidance for Physicians on Internet Prescribing)  
9 ("Physicians who prescribe medications via the Internet shall establish, or have  
10 established, a valid patient-physician relationship, including, but not limited to the  
11 following components. The physician shall: (i) obtain a reliable medical history and  
12 perform a physical examination of the patient, adequate to establish the diagnosis for  
13 which the drug is being prescribed and to identify the underlying conditions and/or  
14 contraindications to the treatment recommended/provided; (ii) have sufficient dialogue  
15 with the patient regarding treatment options and the risks and benefits of the treatment(s);  
16 (iii) as appropriate, follow up with the patient to assess the therapeutic outcome; (iv)  
17 maintain a contemporaneous medical record that is readily available to the patient and,  
18 subject to the patient's consent, to his or her other health care professionals; and (v)  
19 include the electronic prescription information as part of the medical record.").

20           6.     The conduct and circumstances described above constitute unprofessional  
21 conduct pursuant to A.R.S. § 32-1901(B)(12) ("Knowingly dispensing a drug on a  
22 prescription order that was issued in the course of the conduct of business of dispensing  
23 drugs pursuant to diagnosis by mail or the internet.").

1           **Misbranding Prescription-Only Drugs.**

2           7.     Misbranding a prescription-only drug is a prohibited act. A.R.S. § 32-  
3 1965(2) ("The following acts or the causing of any thereof, in addition to any others so  
4 specified in [the Arizona Pharmacy Act, A.R.S. § 32-1901 *et seq.*], are prohibited: ... The  
5 adulteration or misbranding of any drug, device, poison, or hazardous substance.").

6           8.     A prescription-only drug is misbranded if it is dispensed in the course of  
7 the conduct of a business of dispensing drugs pursuant to diagnosis by mail or the  
8 internet. A.R.S. §§ 32-1967(A), -1968(D) (Any drug dispensed in accordance with  
9 A.R.S. § 32-1968(A) is exempt from certain requirements of A.R.S. § 32-1967 if the drug  
10 container bears a label containing certain information. *This exemption does not apply to*  
11 *any drug dispensed in the course of the conduct of a business of dispensing drugs*  
12 *pursuant to diagnosis by mail or the internet ....").*

13          9.     The conduct and circumstances described above constitute unprofessional  
14 conduct pursuant to A.R.S. § 32-1901(B)(2) ("Violating any federal or state law, rule or  
15 regulation relating to the manufacture or distribution of drugs and devices or the practice  
16 of pharmacy.").

17           **Allowing Unlicensed Pharmacy Technicians to Perform Pharmacist Duties.**

18          10.    A pharmacist shall perform the following professional practices in  
19 dispensing a prescription medication from a prescription order:

- 20               • Obtain, or assume responsibility to obtain, from the patient, patient's  
21 agent, or medical practitioner and record, or assume responsibility to record, in the  
22 patient's profile, the following information: (a) name, address, telephone number,  
23 date of birth (or age), and gender; (b) individual history including known diseases  
24 and medical conditions, known drug allergies or drug reactions, and if available a  
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1 comprehensive list of medications currently taken and medical devices currently  
2 used;

3 • Record, or assume responsibility to record, in the patient's profile, a  
4 pharmacist's comments relevant to the patient's drug therapy, including other  
5 information specific to the patient or drug;

6 • Verify the legality and pharmaceutical feasibility of dispensing a drug  
7 based upon: (a) a patients' allergies; (b) incompatibilities with a patient's  
8 currently-taken medications; (c) a patient's use of unusual quantities of dangerous  
9 drugs or narcotics; (d) a medical practitioner's signature; and (e) the frequency of  
10 refills;

11 • Interpret the prescription order, which includes exercising professional  
12 judgment in determining whether to dispense a particular prescription.

13 • Reduce to written or printed form, or assume responsibility to reduce to  
14 written or printed form, a new prescription order received by facsimile, computer  
15 modem, or other means of communication.

16 A.C.C. § R4-23-402(A)(3), (4), (5), (7), (14).

17 11. A pharmacy technician or pharmacy technician trainee shall not perform a  
18 function reserved for a pharmacist. A.C.C. § R4-23-1104(C).

19 12. A person shall not work as a pharmacy technician or pharmacy technician  
20 trainee in Arizona, unless the person possesses a pharmacy technician or pharmacy  
21 technician trainee license issued by the Board. A.C.C. § R4-23-1101(A)(1).

22 13. A person who knowingly performs the duties of a pharmacy technician or a  
23 pharmacy technician trainee without a license is guilty of a class 2 misdemeanor. A.R.S.  
24 § 32-1996(D).

1        14. The conduct and circumstances described above constitute unprofessional  
2 conduct pursuant to A.R.S. § 32-1901(B)(19) ("Violating or attempting to violate,  
3 directly or indirectly, or assisting in or abetting in the violation of, or conspiring to  
4 violate, [the Arizona Pharmacy Act, A.R.S. § 32-1901 *et seq.*].").

5        **Failing to Ensure Proper Functioning and Security of Pharmacy's Computer**  
6        **System**

7        15. A pharmacist-in-charge shall ensure that the pharmacy's computer system  
8 is capable of: (i) producing sight-readable information on all original and refill  
9 prescription orders and patient profiles; (ii) providing on-line retrieval (via CRT display  
10 or hard-copy printout) of original prescription order and patient profile information.  
11 A.C.C. § R4-23- 408(B)(1-3).

12        16. A pharmacist-in-charge shall also ensure that the pharmacy's computer  
13 system has security and systems safeguards designed to prevent and detect unauthorized  
14 access, modification, or manipulation of prescription order information and patient  
15 profiles. A.C.C. § R4-23- 408(F)(1).

16        17. The conduct and circumstances described above constitute unprofessional  
17 conduct pursuant to A.R.S. § 32-1901(B)(2) ("Violating any federal or state law, rule or  
18 regulation relating to the manufacture or distribution of drugs and devices or the practice  
19 of pharmacy.").

20        **Allowing Prescription Orders and Medications To Be Processed Through A**  
21        **Business That Is Not Licensed As a Pharmacy.**

22        18. The conduct and circumstances described above constitute unprofessional  
23 conduct pursuant to A.R.S. § 32-1901(B)(23) ("Participating in an arrangement or  
24 agreement to allow a prescription order or a prescription medication to be left at, picked  
25 up from, accepted by or delivered to a place that is not licensed as a pharmacy. This  
26 paragraph does not prohibit a pharmacist or a pharmacy from using an employee or a

1 common carrier to pick up prescription orders at or deliver prescription medications to  
2 the office or home of a medical practitioner, the residence of a patient or a patient's  
3 hospital.").

#### 4 ORDER

5 Based upon the above Findings of Fact and Conclusions of Law and under the  
6 authority granted to the Board, under A.R.S. §§ 32-1928, 41-1092.07(F)(5), and A.A.C.  
7 R4-23-122(C),

8 IT IS HEREBY ORDERED THAT Arizona Pharmacist License No. 12173, which  
9 was issued to William Brophy, is hereby placed on suspension for a period of forty five  
10 (45) days from the effective date of this Order. Thereafter, Respondent's license shall be  
11 placed on probation for a period of three (3) years from the final date of suspension.

12 The suspension and probation are subject to the following conditions:

13 1. Respondent shall immediately return his pharmacist license to the  
14 Board for the period of suspension.

15 2. Respondent shall take and pass the Multistate Pharmacy Jurisprud-  
16 ence Examination ("MPJE") with a score of seventy-five percent (75%) or better,  
17 within ninety (90) days from the effective date of this order. If Respondent fails  
18 the examination, he can take the examination one more time; however, the retak-  
19 ing of the examination shall occur within the probation period of this Order.

20 3. Respondent shall furnish all pharmacy employers with a copy of this  
21 Board Order throughout the term of his probation.

22 4. Respondent shall not serve as a preceptor pharmacist or pharmacist-  
23 in-charge throughout the term of his probation. Respondent, however, may serve  
24 as pharmacist-in-charge if he continues to serve as pharmacist-in-charge of  
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1 UpTown pharmacy, or if he is an owner of a pharmacy during the term of his  
2 probation.

3 5. Respondent shall advise the Board immediately of any change in  
4 pharmacy employment status throughout the term of his probation.

5 6. Respondent shall furnish the Board with a list of all jurisdictions in  
6 which he maintains or has maintained licensure in the profession of pharmacy  
7 along with the registration numbers of said licenses.

8 7. Respondent shall complete two hundred (200) hours of community  
9 service approved by the Board staff before the termination of the probation period.

10 8. Respondent shall obey all federal and state laws and rules governing  
11 the practice of pharmacy.

12 9. If Respondent violates this order in any way or fails to fulfill the  
13 requirements of this order, or if Respondent fills any Internet prescription orders  
14 without Board approval, the Board, after giving the respondent notice and the  
15 opportunity to be heard, may revoke, suspend or take other disciplinary actions  
16 against the Respondent's license. The issue at such a hearing will be limited  
17 solely to whether this order has been violated.

18 10. Respondent shall appear before the Board at a regularly scheduled  
19 Board meeting three years after the effective date of his probation to request that  
20 the probation imposed by this order be terminated. Respondent's failure to  
21 petition the Board to terminate the probation shall extend the probation period.

22 DATED this 26<sup>th</sup> day of September, 2006.

23 ARIZONA STATE BOARD OF PHARMACY

24 (Seal)

25 By:   
26

HAL WAND, R.Ph.  
Executive Director

ORIGINAL OF THE FORGOING FILED  
this 26 day of September, 2006, with:

Arizona State Board of Pharmacy  
4425 W. Olive Avenue, Suite 140  
Glendale, Arizona 85302

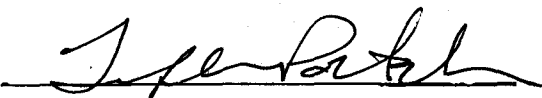
EXECUTED COPY OF THE FOREGOING MAILED  
BY CERTIFIED MAIL

this 26 day of September, 2006, to:

William Brophy  
13352 W. Alvarado Drive  
Goodyear, Arizona 85338  
Respondent

EXECUTED COPY OF THE FOREGOING MAILED  
this 26 day of September, 2006, to:

Dawn Walton Lee  
Assistant Attorney General  
Office of the Attorney General  
15 S. 15th Ave.  
Phoenix, Arizona 85007-3003  
Attorneys for the Arizona State Board  
of Pharmacy



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